

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

ANGEL L. DE JESÚS-MARTINEZ,

Plaintiff,

v.

MICHAEL J. ASTRUE, COMMISSIONER
OF SOCIAL SECURITY,

Defendant.

Civil No. 04-2227 (JAF)

O R D E R

Plaintiff Angel De Jesús-Martinez brings this motion against Defendant Michael J. Astrue, Commissioner of Social Security ("the Commissioner"), for attorneys' fees pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(2006). For the reasons stated below, we grant Plaintiff's motion.

On November 5, 2004, Plaintiff filed a complaint in federal district court seeking review of the Commissioner's decision denying Plaintiff disability benefits. Docket Document No. 2.

On May 6, 2005, we determined that the Commissioner's decision was not supported by substantial evidence because the Commissioner had denied Plaintiff benefits based on a residual functional capacity (RFC) assessment performed by a non-examining physician, despite extensive evidence of Plaintiff's disabling pain. Docket Document Nos. 14, 15. We remanded the case to the Commissioner, instructing him to include an RFC assessment performed by an examining physician

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1 as evidence to support his decision. Id. Plaintiff's attorney
2 continued to represent him in the subsequent administrative
3 proceedings. Docket Document No. 17, exhibit 1.

4 On May 30, 2007, Plaintiff filed the present motion for
5 attorneys' fees. Docket Document No. 17. Plaintiff requests
6 reimbursement for fifty-four hours of attorneys' fees, at a rate of
7 \$125 an hour. Id. Twenty-three hours and thirty minutes of the
8 request represents work completed after the remand. Id. Defendant
9 opposed Plaintiff's motion on June 12, 2007, Docket Document No. 18,
10 and Plaintiff replied on June 13, 2007, Docket Document No. 19.

11 The EAJA provides for mandatory reimbursement of attorneys' fees
12 to parties that prevail in civil proceedings against the United
13 States, unless the court finds that the position of the United States
14 was substantially justified. 28 U.S.C. § 2412(d)(1)(A) (2006). The
15 government bears the burden of demonstrating substantial
16 justification. Schock v. United States, 254 F.3d 1, 5 (1st Cir.
17 2001). Defendant Commissioner of Social Security represents the
18 United States.

19 Here, Defendant has made no attempt to demonstrate that its
20 position was substantially justified. Docket Document No. 18.
21 Moreover, we see no independent reason to find that Defendant's
22 position was justified. The First Circuit has repeatedly held that
23 benefits decisions must include evaluations by examining physicians
24 when a claimant exhibits objective symptoms of a disability. See

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1 Heggarty v. Sullivan, 947 F.2d 990, 997 n.1 (1st Cir. 1991); Rivera-
2 Figueroa v. Sec'y of Health & Human Servs., 858 F.2d 48, 51-52 (1st
3 Cir. 1988); Rivera-Torres v. Sec'y of Health & Human Servs., 837 F.2d
4 4, 6 (1st Cir. 1988); Berrios v. Sec'y of Health & Human Servs., 796
5 F.2d 574, 576 (1st Cir. 1986). Here, the Commissioner considered
6 only an RFC assessment by a non-examining physician, although
7 Plaintiff exhibited objective symptoms of disabling pain. Docket
8 Document Nos. 14, 15. We, therefore, find that the Commissioner's
9 decision was not substantially justified, and Plaintiff is entitled
10 to attorneys' fees under the EAJA.

11 Defendant argues that we should not compensate Plaintiff for
12 work performed by his attorney following the remand because the EAJA
13 only provides for such compensation when the court remands without
14 ruling on the merits. Docket Document No. 18 (citing 42 U.S.C.
15 § 405(g)(2006)).

16 Upon review of a Social Security case, a district court may:
17 (1) enter a judgment on the merits, and remand for further
18 administrative proceedings consistent with the judgment; or
19 (2) remand for the consideration of new evidence. 42 U.S.C.
20 § 405(g). Plaintiffs may receive attorneys' fees only for work
21 performed after the second type of remand. Melkonyan v. Sullivan,
22 501 U.S. 80, 97-98 (1991); Shalala v. Schaefer, 509 U.S. 292, 300-01
23 (1993); Rivera Baez v. Sec'y of Health & Human Servs., 832 F.Supp.
24 28, 29 (D.P.R. 1993) (applying Schaefer).

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1 Defendants argue that Plaintiff is not entitled to attorneys'
2 fees for work performed after the remand because our finding that the
3 Commissioner's denial was not supported by substantial evidence
4 constituted a judgment on the merits. Docket Document No. 18.
5 However, in our remand order we found that the denial was not
6 supported by substantial evidence because of the lack of a proper RFC
7 assessment. Docket Document Nos. 14, 15. We, therefore, remanded
8 for consideration of new evidence, without ruling on the merits. See
9 Vigo Ramos v. Comm'r of Soc. Sec. Admin., 241 F.Supp.2d 139, 142
10 (D.P.R. 2003); Morales Colón v. Comm'r of Soc. Sec., 245 F. Supp. 2d
11 395, 400-01 (D.P.R. 2005). Therefore, we grant Plaintiff attorneys'
12 fees for work completed both before and after the remand. See
13 Schaefer, 509 U.S. at 294-97.

14 For the reasons stated herein, we **GRANT** Plaintiff's motion for
15 attorneys' fees, Docket Document No. 17. We hereby order Defendant
16 to pay Plaintiff \$6,750 for fifty-four hours of attorneys' fees, at
17 a rate of \$125 per hour.

18 **IT IS SO ORDERED.**

19 San Juan, Puerto Rico, this 14th day of September, 2007.

20 s/José Antonio Fusté
21 JOSE ANTONIO FUSTE
22 Chief U. S. District Judge